

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SHALEENA M. MILLER,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of  
Social Security,

Defendant.

Case No. 3:12-cv-05080-RBL-KLS

REPORT AND RECOMMENDATION

Noted for December 7, 2012

Plaintiff has brought this matter for judicial review of defendant's denial of her applications for disability insurance and supplemental security income ("SSI") benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Court's review, recommending that for the reasons set forth below, defendant's decision to deny benefits should be reversed and this matter should be remanded for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On June 25, 2008, plaintiff filed an application for disability insurance benefits and another one for SSI benefits, alleging disability as of June 30, 2007, due to spine problems. See

Administrative Record (“AR”) 17, 114, 118. Both applications were denied upon initial administrative review on November 17, 2008, and on reconsideration on March 9, 2009. See AR 17. A hearing was held before an administrative law judge (“ALJ”) on April 7, 2010, at which plaintiff, represented by counsel, appeared and testified, as did a vocational expert. See AR 35-63.

On April 9, 2010, the ALJ issued a decision in which plaintiff was determined to be not disabled. See AR 17-25. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals Council on November 25, 2011, making the ALJ’s decision defendant’s final decision. See AR 1; see also 20 C.F.R. § 404.981, § 416.1481. On February 14, 2012, plaintiff filed a complaint in this Court seeking judicial review of the ALJ’s decision. See ECF #5. The administrative record was filed with the Court on May 7, 2012. See ECF #13. The parties have completed their briefing, and thus this matter is now ripe for the Court’s review.

Plaintiff argues defendant’s decision should be reversed and remanded for an award of benefits, or in the alternative for further administrative proceedings, because the ALJ erred: (1) in evaluating the medical evidence in the record; (2) in discounting plaintiff’s credibility; (3) in assessing plaintiff’s residual functional capacity; and (4) in finding her to be capable of performing other jobs existing in significant numbers in the national economy. The undersigned agrees the ALJ erred in determining plaintiff to be not disabled, but, for the reasons set forth below, recommends that while defendant’s decision should be reversed, this matter should be remanded for further administrative proceedings.

#### DISCUSSION

The determination of the Commissioner of Social Security (the “Commissioner”) that a claimant is not disabled must be upheld by the Court, if the “proper legal standards” have been

1 applied by the Commissioner, and the “substantial evidence in the record as a whole supports”  
 2 that determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v.  
 3 Commissioner of Social Security Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan,  
 4 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will,  
 5 nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence  
 6 and making the decision.”) (citing Browner v. Secretary of Health and Human Services, 839 F.2d  
 7 432, 433 (9th Cir. 1987)).

8  
 9 Substantial evidence is “such relevant evidence as a reasonable mind might accept as  
 10 adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation  
 11 omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if  
 12 supported by inferences reasonably drawn from the record.”). “The substantial evidence test  
 13 requires that the reviewing court determine” whether the Commissioner’s decision is “supported  
 14 by more than a scintilla of evidence, although less than a preponderance of the evidence is  
 15 required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence  
 16 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.  
 17 Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence  
 18 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting  
 19 Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>

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 22  
 23 <sup>1</sup> As the Ninth Circuit has further explained:

24 . . . It is immaterial that the evidence in a case would permit a different conclusion than that  
 25 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by  
 26 substantial evidence, the courts are required to accept them. It is the function of the  
 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may  
 not try the case de novo, neither may it abdicate its traditional function of review. It must  
 scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are  
 rational. If they are . . . they must be upheld.

Sorenson, 514 F.2d at 1119 n.10.

1 I. The ALJ's Evaluation of the Medical Evidence in the Record

2 The ALJ is responsible for determining credibility and resolving ambiguities and  
3 conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).  
4 Where the medical evidence in the record is not conclusive, "questions of credibility and  
5 resolution of conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639,  
6 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v.  
7 Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining  
8 whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at  
9 all) and whether certain factors are relevant to discount" the opinions of medical experts "falls  
10 within this responsibility." Id. at 603.

12 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings  
13 "must be supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this  
14 "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,  
15 stating his interpretation thereof, and making findings." Id. The ALJ also may draw inferences  
16 "logically flowing from the evidence." Sample, 694 F.2d at 642. Further, the Court itself may  
17 draw "specific and legitimate inferences from the ALJ's opinion." Magallanes v. Bowen, 881  
18 F.2d 747, 755, (9th Cir. 1989).

20 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted  
21 opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.  
22 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can  
23 only be rejected for specific and legitimate reasons that are supported by substantial evidence in  
24 the record." Id. at 830-31. However, the ALJ "need not discuss *all* evidence presented" to him  
25 or her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984)

(citation omitted) (emphasis in original). The ALJ must only explain why “significant probative evidence has been rejected.” Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

In general, more weight is given to a treating physician’s opinion than to the opinions of those who do not treat the claimant. See Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and inadequately supported by clinical findings” or “by the record as a whole.” Batson v. Commissioner of Social Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); see also Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). An examining physician’s opinion is “entitled to greater weight than the opinion of a nonexamining physician.” Lester, 81 F.3d at 830-31. A non-examining physician’s opinion may constitute substantial evidence if “it is consistent with other independent evidence in the record.” Id. at 830-31; Tonapetyan, 242 F.3d at 1149.

A. Dr. Virgin

Plaintiff argues that although the ALJ discussed some the medical records in the record from her treating physician, Robin Virgin, M.D., she erred by failing to give any reason for not adopting them and by not mentioning Dr. Virgin by name. As to the ALJ’s failure to mention Dr. Virgin by name, the undersigned finds no error here, as plaintiff has not shown how she has been prejudiced thereby. There is no requirement that medical providers, even treating sources, be mentioned by name in an ALJ’s decision. In addition, as plaintiff herself acknowledges, the ALJ in this case expressly discussed Dr. Virgin’s records.

Nor does the undersigned find any impropriety in the ALJ’s alleged error in not giving any reason for rejecting those records. Dr. Virgin’s records do not contain any opinions as to

1 the existence of work-related limitations, but instead record plaintiff's self-reported complaints,  
2 diagnoses of physical impairments, notes concerning recommended and prescribed treatment,  
3 and some objective clinical findings. See AR 227-33, 307-17, 322-23, 330-32. But "[t]he mere  
4 existence of an impairment" – or the fact that some clinical findings have been made and that  
5 treatment has been provided or recommended – "is insufficient proof of a disability." Matthews  
6 v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993). As discussed in greater detail below, furthermore,  
7 the ALJ did not err in finding plaintiff was not fully credible regarding her subjective complaints  
8 and allegations of total disability.  
9

10 Plaintiff argues that this misses the point, that the medical records "are not significant  
11 because they include an assessment of work-related limitations," but because "they document  
12 findings and diagnoses which provide an evidentiary basis for the limitations [she] described in  
13 her statements and testimony." ECF #18, p. 3. This argument is valid, though, only in regard to  
14 the issue of whether plaintiff has medically determinable impairments that "could reasonably be  
15 expected to cause [her] alleged symptoms," which plaintiff again acknowledges the ALJ did in  
16 this case. AR 21; see also Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir.1991). Such records,  
17 though, do not themselves – again, absent the existence of actual opined work-related limitations  
18 contained therein – provide support for the level of severity regarding those symptoms plaintiff is  
19 claiming.  
20

21 **B. Other Medical Evidence Regarding Alleged Physical Impairments**  
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23 Plaintiff makes a similar argument regarding medical evidence from a physical therapy  
24 session she attended in early October 2007, and from John L. Hart, D.O., who examined her in  
25 late January 2009. See ECF #16, pp. 4-5 (quoting and citing AR 219-20, 304). Specifically, she  
26 asserts the ALJ discussed this evidence, but did not give any reason for rejecting it. But for the

1 same reasons plaintiff's argument concerning Dr. Virgin's medical records lacks merit, so too  
 2 does her argument here. On the other hand, the undersigned agrees that the ALJ erred in failing  
 3 to properly account for the need to alternate between sitting and standing/walking assessed by  
 4 Brian Gehley, PT, in late March 2010.

5 Based on a one-hour physical capacities evaluation, Mr. Gehley opined that plaintiff was  
 6 "appropriate for full time, light duty work without positional restrictions," but would "do better if  
 7 she can change positions between sitting and standing/walking every 20-30 minutes." AR 354.  
 8 In her decision, the ALJ found Mr. Gehley's evaluation supported a finding that plaintiff was  
 9 "capable of light exertion work with postural and manipulative limitations and some limitations  
 10 in neck positions." AR 22. Plaintiff argues that while the ALJ did not err in so finding, she erred  
 11 in failing to include with the sit/stand option she assessed, an additional need to shift to walking  
 12 as found by Mr. Gehley.<sup>2</sup> See AR 20.

13 Defendant states plaintiff's argument here is misplaced, asserting that an ALJ's finding  
 14 that a claimant needs a sit/stand option (i.e., that he or she needs to alternate between sitting and  
 15 standing), "necessarily contemplates getting up from sitting and then either standing or walking  
 16 for awhile before returning to sitting." ECF #17, p. 7. Defendant relies on the language of Social  
 17 Security Ruling ("SSR") 83-12 for this proposition, which reads in relevant part:

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 19  
 20 *1. Alternate Sitting and Standing*

21 In some disability claims, the medical facts lead to an assessment of [residual  
 22 functional capacity ("RFC")] which is compatible with the performance of  
 23 either sedentary or light work except that the person must alternate periods of  
 24 sitting and standing. The individual may be able to sit for a time, but must  
 then get up and stand or walk for awhile before returning to sitting. . . .

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25 <sup>2</sup> Plaintiff also finds fault with the ALJ for failing "to acknowledge that Mr. Gehley based his opinion on a one-hour  
 26 assessment, so it is unclear how accurate his assessment would be for determining [plaintiff's] ability to perform  
 activities for a full eight hour workday." ECF #16, p. 5. But plaintiff does not explain or cite any evidence showing  
 how a one-hour physical capacity evaluation, and that provided by Mr. Gehley in particular, results in an inaccurate  
 description of plaintiff's capacity to perform physical activity on a full-time basis.

1 Id., 1983 WL 31253 \*4. At most, however, this language appears to recognize that when an ALJ  
2 assesses a sit/stand option, that option *may* include the need to stand or walk, and not that in each  
3 case both options must be presumed to be included as defendant argues. In other words, the verb  
4 “must” more reasonably is read to mean that a sit/stand option necessarily contemplates the need  
5 to get up and stand or walk, but does not mandate which option – or whether as defendant would  
6 have it here both options – is contemplated where the ALJ fails to so specify.  
7

8 In this case, as noted above, the ALJ did not specify what option or options she had in  
9 mind in imposing a sit/stand option, even though she was aware of Mr. Gehley’s opinion that  
10 plaintiff would “do better if she can change positions between sitting and standing/walking.” AR  
11 22, 354; see also AR 20. Thus, to the extent the ALJ intended to include an option to both walk  
12 and stand in her RFC assessment that is not at all clear. What is clear, however, is that at the  
13 very least Mr. Gehley believed plaintiff needed to have the option of “walking about” for less  
14 than 15 minutes after sitting. AR 358-59. The importance of the absence of this option in the  
15 ALJ’s residual functional capacity assessment in terms of its prejudicial effect on plaintiff’s  
16 claim is further made clear, by the absence thereof in the hypothetical question the ALJ posed to  
17 the vocational expert at the hearing. See AR 61. That is, even if the ALJ did intend to include a  
18 walking option in her RFC assessment, that option was not presented to the vocational expert for  
19 consideration when testifying as to plaintiff’s ability to perform other jobs.  
20  
21

22 C. Other Medical Evidence Regarding Alleged Mental Impairments

23 Plaintiff cites to various diagnoses, clinical findings and self-reported mental health  
24 symptoms contained in medical records from Scott T. Alvord, Psy.D., and Colby Rauch,  
25 PMHNP, arguing that while the ALJ gave these findings some weight, she failed to acknowledge  
26 they “provide an objective evidentiary basis for [plaintiff’s] complaint’s [sic] of anxiety and



depression.” See ECF #16, pp 5-7 (citing and quoting 283, 287, 340-42). Once more, though, for the same reasons the ALJ did not err in regard to the medical evidence from Dr. Virgin and Dr. Hart discussed above, she also did not err here, in light of the fact that none of this evidence establishes the existence of actual work-related limitations, and the ALJ did not err in discounting plaintiff’s credibility.

Plaintiff makes the same argument with respect to a mental health intake evaluation performed by Kristin Poage, MA, MHP, in which Mr. Poage recorded some clinical findings, diagnosed plaintiff with posttraumatic stress disorder and rule-out borderline personality disorder traits, and gave her a global assessment of functioning (“GAF”) score of 50.<sup>3</sup> See AR 373-74.

With respect to Ms. Poage, the ALJ found in relevant part that:

... Kristine Poage, MA, a therapist who began seeing the claimant in February 2010, reported in March 2010 that the claimant’s functional limitations were unknown (Exhibits 16F, 17F). In an addendum she noted that the claimant reported difficulty with anxiety in social situations which would cause impairment in a work environment and had also reported a history of difficulty maintaining employment (Exhibit 18F). This statement addresses only what the claimant described and does not contain any observations or mental status findings. It is given little weight in assessing the claimant’s residual functional capacity.

AR 23. Plaintiff does not present any specific argument challenging these stated reasons for discounting Ms. Poage’s opinion, and therefore this challenge is not entitled to any particular merit. See Carmickle v. Commissioner of Social Sec. Admin., 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (issue not argued with specificity in briefing will not be addressed); Paladin Associates.,

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<sup>3</sup> A GAF score is “a subjective determination based on a scale of 100 to 1 of ‘the [mental health] clinician’s judgment of [a claimant’s] overall level of functioning.’” Pisciotta v. Astrue, 500 F.3d 1074, 1076 n.1 (10th Cir. 2007) (citation omitted). It is “relevant evidence” of the claimant’s ability to function mentally. England v. Astrue, 490 F.3d 1017, 1023, n.8 (8th Cir. 2007). “A GAF score of 41-50 indicates ‘[s]erious symptoms . . . [or] serious impairment in social, occupational, or school functioning,’ such as an inability to keep a job.” Pisciotta, 500 F.3d at 1076 n.1 (quoting Diagnostic and Statistical Manual of Mental Disorders (Text Revision 4th ed. 2000) at 34); see also England v. Astrue, 490 F.3d 1017, 1023, n.8 (8th Cir. 2007) (GAF score of 50 reflects serious limitations in individual’s general ability to perform basic tasks of daily life).

1 Inc. v. Montana Power Co., 328 F.3d 1145, 1164 (9th Cir. 2003) (by failing to make argument in  
2 opening brief, objection to district court's grant of summary judgment was waived); Kim v.  
3 Kang, 154 F.3d 996, 1000 (9th Cir.1998) (matters not specifically and distinctly argued in  
4 opening brief ordinarily will not be considered). Nevertheless, the undersigned finds the ALJ's  
5 stated reasons to be proper and supported by the record.<sup>4</sup>

6  
7 The ALJ also did not err in failing to acknowledge, as plaintiff asserts, that she "has  
8 consistently been taking psychotropic medications to treat her mental health conditions" (ECF  
9 #16, p. 7), as the mere fact that a claimant takes medications is insufficient to establish the  
10 presence of actual work-related limitations, let alone a finding of disability. Lastly, plaintiff  
11 argues the ALJ erred in not giving sufficient weight to the disability opinion offered by Pat  
12 Sumlin, LMFT, with regard to which the ALJ found as follows:

13 Pat Sumlin, LMFT, who has not treated the claimant but is an acquaintance,  
14 reported in April 2010 that the claimant is sensitive to criticism and has  
15 extreme mood shifts. She has intrusive memories. Ms. Sumlin provides a list  
16 of 20 mental health diagnoses. She states the claimant cannot sustain an 8-  
17 hour workday and would be absent more than 3 times a month. She describes  
18 marked to extreme limitations in numerous work-related areas and opines  
19 these limitations have existed for at least 10 years. (Exhibit 19F). As Ms.  
20 Sumlin is not an acceptable medical source and has not seen the claimant on a  
21 professional basis, her assessment of the claimant's diagnoses and functional  
22 limitations is given no weight. The undersigned has considered her  
23 allegations as a lay witness but finds they are not credible. Although she  
24 reports debilitating limitations for at least 10 years, the claimant has worked at  
25 substantial gainful activity levels and has attended college during this time  
26 period and has been the primary caregiver for her daughter over the past 2  
years. These activities are not consistent with the limitations described by Ms.  
Sumlin.

AR 23. Once more, plaintiff does not address the specific reasons for rejecting Ms. Sumlin's

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<sup>4</sup> See AR 364-80; Batson, 359 F.3d at 1195 (ALJ need not accept opinion of treating physician if it is inadequately supported by clinical findings); Tonapetyan, 242 F.3d at 1149 (ALJ may disregard medical opinion premised on claimant's complaints where record supports ALJ in discounting claimant's credibility); Morgan, 169 F.3d at 601 (opinion of physician premised to large extent on claimant's own accounts of her symptoms and limitations may be disregarded where those complaints have been properly discounted).

1 opinion here, and thus her argument need not be considered. See Carmickle, 533 F.3d at 1161  
 2 n.2; Paladin, 328 F.3d at 1164; Kim, 154 F.3d at 1000. Further, as with the ALJ's treatment of  
 3 Ms. Poage's findings, those reasons are valid.<sup>5</sup>

## 4 II. The ALJ's Assessment of Plaintiff's Credibility

5 Questions of credibility are solely within the control of the ALJ. See Sample, 694 F.2d at  
 6 642. The Court should not "second-guess" this credibility determination. Allen, 749 F.2d at 580.  
 7 In addition, the Court may not reverse a credibility determination where that determination is  
 8 based on contradictory or ambiguous evidence. See id. at 579. That some of the reasons for  
 9 discrediting a claimant's testimony should properly be discounted does not render the ALJ's  
 10 determination invalid, as long as that determination is supported by substantial evidence.  
 11 Tonapetyan, 242 F.3d at 1148.

12 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent  
 13 reasons for the disbelief." Lester, 81 F.3d at 834 (citation omitted). The ALJ "must identify what  
 14 testimony is not credible and what evidence undermines the claimant's complaints." Id.; see also  
 15 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the  
 16 claimant is malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear  
 17 and convincing." Lester, 81 F.2d at 834. The evidence as a whole must support a finding of  
 18 malingering. See O'Donnell v. Barnhart, 318 F.3d 811, 818 (8th Cir. 2003).

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22  
 23 <sup>5</sup> Lay testimony regarding a claimant's symptoms "is competent evidence that an ALJ must take into account,"  
 24 unless the ALJ "expressly determines to disregard such testimony and gives reasons germane to each witness for  
 25 doing so." Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001). In rejecting lay testimony, the ALJ need not cite the  
 26 specific record as long as "arguably germane reasons" for dismissing the testimony are noted, even though the ALJ  
 does "not clearly link his determination to those reasons," and substantial evidence supports the ALJ's decision. Id.  
 at 512. The ALJ also may "draw inferences logically flowing from the evidence." Sample, 694 F.2d at 642. An  
 ALJ, furthermore, may reject lay witness evidence if other evidence in the record regarding the claimant's activities  
 is inconsistent therewith. See Carmickle, 533 F.3d at 1164 (ALJ's rejection of lay witness evidence because it was  
 inconsistent with claimant's successful completion of continuous full-time coursework constituted reason germane  
 to lay witness).

1 In determining a claimant's credibility, the ALJ may consider "ordinary techniques of  
2 credibility evaluation," such as reputation for lying, prior inconsistent statements concerning  
3 symptoms, and other testimony that "appears less than candid." Smolen v. Chater, 80 F.3d 1273,  
4 1284 (9th Cir. 1996). The ALJ also may consider a claimant's work record and observations of  
5 physicians and other third parties regarding the nature, onset, duration, and frequency of  
6 symptoms. See id.

8 The ALJ in this case discounted plaintiff's credibility in part on the basis that the medical  
9 evidence in the record regarding her physical impairments did not completely support her alleged  
10 symptoms. See AR 21-22. A determination that a claimant's subjective complaints are  
11 "inconsistent with clinical observations" can satisfy the clear and convincing requirement.  
12 Regennitter v. Commissioner of SSA, 166 F.3d 1294, 1297 (9th Cir. 1998). The undersigned  
13 finds this reason proper to the extent discussed above that the ALJ did not err in evaluating the  
14 medical evidence in the record, but not in regard to the need for a sit/stand option for the reasons  
15 also discussed above. As such, the ALJ erred in part here.<sup>6</sup>

17 The ALJ next discounted plaintiff's credibility for the following reasons:

18 Although the claimant testified to severe fatigue, treatment records reflect  
19 repeated denials of fatigue. She denied fatigue or weakness in August 2008  
20 and in September 2008 (Exhibit 4F-7, 11). She again denied such symptoms  
21 in January 2009 (Exhibit 10F-2). She continued to deny fatigue in August  
22 2009 (Exhibit 12F-3).

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23 <sup>6</sup> Plaintiff argues the ALJ did "not clearly link her credibility analysis to that evidence, or explain any way in which  
24 the medical evidence contradicts [her] description of her symptoms and limitations." ECF #16, p. 10. But the ALJ  
25 discussed the medical evidence in the record in a fair amount of detail, particularly in regard to her pain complaints,  
26 and noted, for example, the relatively normal clinical findings, as well as one physician's recommendation that she  
engage in "high-level exercise in a gym setting," and instruction that she "discontinue her pain medications and  
instead use over-the-counter Ibuprofen or Tylenol as needed," with "[c]ontinued use of opioids" not recommended.  
AR 21-22; see also AR 304; Meanal v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (ALJ properly considered  
physician's failure to prescribe serious medical treatment for supposedly excruciating pain); Johnson v. Shalala, 60  
F.3d 1428, 1434 (9th Cir. 1995) (ALJ properly found prescription of physician for conservative treatment only to be  
suggestive of lower level of pain and functional limitation).

1 AR 22. Plaintiff argues that the ALJ is mischaracterizing her testimony here, that she actually  
2 testified that she experienced a lot of side effects from her medication, including feeling fatigued  
3 and lethargic, and that “[t]he fact that [her] doctor did not record her complaints of medication  
4 side effects is not a convincing reason to reject [her] testimony about” those side effects. ECF  
5 #16, p. 9. This argument is wholly without merit. The fact that plaintiff’s reported denials of  
6 fatigue conflict with her hearing testimony is itself a clear and convincing reason for finding her  
7 to be not fully credible. In addition, Dr. Virgin, plaintiff’s treating physician, expressly noted on  
8 several different occasions that she “[d]enies fatigue and weakness.” AR 228, 232, 308, 311,  
9 313, 316, 322, 331. Far from suggesting Dr. Virgin did not record plaintiff’s complaints of side  
10 effects, a much more reasonable reading of this evidence is that she expressly related not having  
11 them during those visits.  
12

13 The ALJ also discounted plaintiff’s credibility because:  
14

15 The claimant has been able to lead an active lifestyle despite her pain  
16 complaints. She is the primary caregiver for her daughter. She testified she  
17 has looked for work. She has collected unemployment during the time period  
at issue, indicating she has reported she is capable of working, as that is a  
requirement to obtain such benefits (Exhibit 6D).

18 AR 22; see Copeland v. Bowen, 861 F.2d 536, 542 (9th Cir. 1988) (noting ALJ gave specific  
19 reasons for rejecting claimant’s credibility, including his receipt of unemployment benefits,  
20 indicating he apparently considered himself capable of work and holding himself out as being  
21 available therefor). Defendant concedes, however, that the record does not clearly show plaintiff  
22 held herself out as being available for full-time work in filing for unemployment benefits. See  
23 ECF #17, p. 17. The undersigned thus declines to find this stated reason to be a valid basis for  
24 discounting plaintiff’s credibility.  
25  
26

1 Nor does the record show that plaintiff engaged in an “active lifestyle,” such that she was  
2 able to perform household chores or other activities of daily living for a substantial part of the  
3 day, or that those activities are necessarily transferrable to a work place setting or inconsistent  
4 with her other testimony.<sup>7</sup> See AR 50, 153-63, 189. While it is true that plaintiff is the primary  
5 care giver for her daughter, the record also indicates that she receives significant help with that  
6 responsibility from others. See AR 42, 156, 163, 177, 189. Accordingly, this too was not a clear  
7 and convincing reason for discounting plaintiff’s credibility.  
8

9 On the other hand, the ALJ did not err in discounting plaintiff’s credibility on the basis of  
10 medical improvement in regard to her mental health issues. See AR 22-23; Morgan, 169 F.3d at  
11 599 (ALJ may discount claimant’s credibility based on medical improvement); Tidwell v. Apfel,  
12 161 F.3d 599, 601 (9th Cir. 1998). The ALJ also did not err in noting that plaintiff “attended  
13 three therapy sessions in 2008 but did not continue treatment” thereafter. AR 22; see also Burch  
14 v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) (upholding ALJ’s discounting of claimant’s  
15 credibility in part due to lack of consistent treatment, noting that fact that claimant’s pain was not  
16 sufficiently severe to motivate her to seek treatment, even if she had sought some treatment, was  
17 powerful evidence regarding extent to which she was in pain); Fair v. Bowen, 885 F.2d 597, 603  
18 (9th Cir. 1989) (failure to assert good reason for not following prescribed course of treatment  
19 “can cast doubt on the sincerity of the claimant’s pain testimony”). Nor has plaintiff specifically  
20  
21

22  
23 <sup>7</sup> The Ninth Circuit has recognized “two grounds for using daily activities to form the basis of an adverse credibility  
24 determination.” Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007). First, such activities can “meet the threshold for  
25 transferable work skills.” Id. Thus, a claimant’s credibility may be discounted if he or she “is able to spend a  
26 substantial part of his or her day performing household chores or other activities that are transferable to a work  
setting.” Smolen, 80 F.3d at 1284 n.7. The claimant, however, need not be “utterly incapacitated” to be eligible for  
disability benefits, and “many home activities may not be easily transferable to a work environment.” Id. In  
addition, the Ninth Circuit has “recognized that disability claimants should not be penalized for attempting to lead  
normal lives in the face of their limitations.” Reddick, 157 F.3d at 722. Under the second ground in Orn, a  
claimant’s activities of daily living can “contradict his [or her] other testimony.” 495 F.3d at 639.

1 challenged either of these stated reasons in her opening brief.<sup>8</sup>

2       The ALJ further discounted plaintiff's credibility because "[s]he began counseling in  
3 March 2009 but her claim was closed the same month when she produced no documentation to  
4 support her claims of an auto accident or a legally blind daughter," and because "[i]t was found  
5 she was collecting unemployment illegally." AR 23. This too was proper as it goes directly to  
6 plaintiff's reputation for honesty, a finding which once more plaintiff has not challenged. Also  
7 proper is the ALJ's calling into question of plaintiff's credibility on the basis that although she  
8 "testified to fear of men" and also reported "difficulty getting along with people," that fear is  
9 "unsupported by the treatment record" and plaintiff "stated she can be 'fairly charismatic if I  
10 want to be.'" AR 23. Here too, plaintiff offers no specific challenge.

12       It is true, as noted above, that not all of the ALJ's stated reasons for finding plaintiff to be  
13 not fully credible were proper. Nevertheless, the fact that some of the reasons for discounting  
14 plaintiff's credibility were improper, does not render the ALJ's credibility determination invalid,  
15 as long as that determination is supported by substantial evidence in the record, as it is in this  
16 case for the reasons discussed above. See Tonapetyan, 242 F.3d at 1148; Bray v. Commissioner  
17 of Social Sec. Admin., 554 F.3d 1219, 1227 (9th Cir. 2009) (while ALJ relied on improper  
18 reason for discounting claimant's credibility, he presented other valid, independent bases for  
19 doing so, each with "ample support in the record").  
20  
21  
22

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23 <sup>8</sup> Plaintiff argues in her reply brief that the ALJ failed to acknowledge she was taking multiple medications, despite  
24 also testifying that they caused significant side effects. See ECF #18, p. 9 (citing AR 47-49). As discussed above,  
25 however, the ALJ did not err in discounting plaintiff's credibility on the basis that the medical record contradicts her  
26 testimony with regard to at least two of those alleged side effects, fatigue and weakness. Nor does plaintiff's  
argument deal with the fact that the ALJ also properly found she actually experienced improvement on medication,  
or that the ALJ provided a number of other valid reasons for discounting plaintiff's credibility, and thus was not  
required to accept her testimony as to the side effects she claims to have experienced. Indeed, plaintiff does not  
point to any medical evidence in the record that these side effects occurred, let alone that they had a significant  
impact on her functioning.



1 III. The ALJ's Assessment of Plaintiff's Residual Functional Capacity

2 Defendant employs a five-step "sequential evaluation process" to determine whether a  
3 claimant is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found  
4 disabled or not disabled at any particular step thereof, the disability determination is made at that  
5 step, and the sequential evaluation process ends. See id. If a disability determination "cannot be  
6 made on the basis of medical factors alone at step three of that process," the ALJ must identify  
7 the claimant's "functional limitations and restrictions" and assess his or her "remaining  
8 capacities for work-related activities." Social Security Ruling ("SSR") 96-8p, 1996 WL 374184  
9 \*2. A claimant's residual functional capacity ("RFC") assessment is used at step four to  
10 determine whether he or she can do his or her past relevant work, and at step five to determine  
11 whether he or she can do other work. See id.

13 Residual functional capacity thus is what the claimant "can still do despite his or her  
14 limitations." Id. It is the maximum amount of work the claimant is able to perform based on all  
15 of the relevant evidence in the record. See id. However, an inability to work must result from the  
16 claimant's "physical or mental impairment(s)." Id. Thus, the ALJ must consider only those  
17 limitations and restrictions "attributable to medically determinable impairments." Id. In  
18 assessing a claimant's RFC, the ALJ also is required to discuss why the claimant's "symptom-  
19 related functional limitations and restrictions can or cannot reasonably be accepted as consistent  
20 with the medical or other evidence." Id. at \*7.

22 In this case, the ALJ found plaintiff had the residual functional capacity:

23  
24 **... to perform light work ... except she is limited to frequent balancing**  
25 **and stooping. She can frequently bend the neck forward and rotate the**  
26 **neck. She is limited to occasional backward flexion with the neck. She is**  
**limited to occasional backward flexion with the neck and frequent**  
**reaching, handling, and fingering. She requires a sit/stand option. She is**  
**limited to simple routine tasks in a routine work environment. She should**



1           **have no contact with the public and only superficial coworker contact.**

2 AR 20-21 (emphasis in original). Plaintiff argues the ALJ erred in assessing the above residual  
3 functional capacity, because it does not include all of the limitations described in her testimony.  
4 As discussed above, however, the ALJ did not err in discounting plaintiff's credibility regarding  
5 her subjective complaints, and thus was not obligated to adopt any additional limitations that are  
6 contained in that testimony. On the other hand, also as discussed above, the ALJ erred in failing  
7 to properly consider the sit/stand/walk option assessed by Mr. Gehley, and therefore it cannot be  
8 said at this time that the ALJ's RFC assessment is completely accurate.  
9

10 IV.    The ALJ's Findings at Step Five

11           If a claimant cannot perform his or her past relevant work, at step five of the disability  
12 evaluation process the ALJ must show there are a significant number of jobs in the national  
13 economy the claimant is able to do. See Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir.  
14 1999); 20 C.F.R. § 404.1520(d), (e), § 416.920(d), (e). The ALJ can do this through the  
15 testimony of a vocational expert or by reference to defendant's Medical-Vocational Guidelines  
16 (the "Grids"). Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th  
17 Cir. 2000).  
18

19           An ALJ's findings will be upheld if the weight of the medical evidence supports the  
20 hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987);  
21 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony  
22 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See  
23 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the  
24 claimant's disability "must be accurate, detailed, and supported by the medical record." Id.  
25 (citations omitted). The ALJ, however, may omit from that description those limitations he or  
26

1 she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

2 At the hearing, the ALJ posed hypothetical questions to the vocational expert containing  
3 substantially the same limitations as were included in the ALJ's assessment of plaintiff's residual  
4 functional capacity. See AR 61-62. In response to these questions, the vocational expert testified  
5 that an individual with those limitations would be able to perform other jobs. See id. Based on  
6 the testimony of the vocational expert, the ALJ found plaintiff would be capable of performing  
7 other jobs existing in significant numbers in the national economy. See AR 24-25.  
8

9 Plaintiff argues the hypothetical question the ALJ posed did not include all of her  
10 limitations. The undersigned agrees that for the same reason the ALJ's RFC assessment cannot  
11 be said to be completely accurate, it also cannot be said that the hypothetical question the ALJ  
12 posed, which is premised on that RFC assessment, includes all of plaintiff's limitations at this  
13 time. The undersigned rejects, however, plaintiff's argument that the jobs the vocational expert  
14 identified that could be performed should not have been accepted by the ALJ, because they  
15 involve Level 2 reasoning as defined by the Dictionary of Occupational Titles ("DOT"), whereas  
16 the ALJ limited her to simple, routine tasks in assessing her RFC, which is commensurate with  
17 Level 1 reasoning.  
18

19 The DOT defines Level 1 through 2 reasoning as follows:

20 LEVEL 2

21 Apply commonsense understanding to carry out detailed but uninvolved  
22 written or oral instructions. Deal with problems involving a few concrete  
23 variables in or from standardized situations.

24 LEVEL 1

25 Apply commonsense understanding to carry out simple one- or two-step  
26 instructions. Deal with standardized situations with occasional or no variables  
in or from these situations encountered on the job.

1 DOT, Appendix C. The undersigned disagrees, however, that the ALJ's limitation to simple,  
2 routine tasks is commensurate with Level 1 reasoning in this case. As pointed out by defendant,  
3 several courts have found Level 2 reasoning to be consistent with the ability to do simple, routine  
4 and/or repetitive work tasks. See, e.g., Hackett v. Barnhart, 395 F.3d 1168, 1176 (10th Cir. 2005)  
5 (finding Level 2 reasoning to be more consistent with limitation to simple, routine work tasks);  
6 Meissl v. Barnhart, 403 F.Supp.2d 981, 983-85 (C.D. Cal. 2005) (finding limitation to simple  
7 and repetitive tasks to be closer to Level 2 reasoning); Flaherty v. Halter, 182 F.Supp.2d 824,  
8 850-51 (D. Minn. 2001) (finding Level 2 reasoning did not conflict with limitation to work  
9 involving simple, routine, repetitive, concrete, and tangible tasks).

11 It is true, as pointed out by plaintiff, that two courts appear to disagree with the position  
12 taken by the above courts. See Lucy v. Chater, 113 F.3d 905, 909 (8th Cir. 1997) (rejecting  
13 contention that claimant limited to following only simple instructions can engage in full range of  
14 sedentary work because many unskilled jobs in that category require reasoning levels of 2 or  
15 higher); see also Whitzell v. Barnhart, 379 F.Supp.2d 204, 219-20 (D. Mass. 2005). However,  
16 the undersigned finds more persuasive the discussion of this issue made by the United States  
17 District Court for the Central District of California:  
18

19 This leaves the question of whether the vocational expert's opinion  
20 contradicted the DOT's descriptions for Meissl's other work as a stuffer given  
21 the ALJ's RFC finding limiting Meissl to "simple, repetitive" tasks. The Court  
22 finds that it does not.

23 As one goes up the numerical reasoning development scale used by the DOT,  
24 the level of detail involved in performing the job increases while the job task  
25 becomes less routine. For example, a job with a reasoning level of one only  
26 requires that the worker be able to "[a]pply commonsense understanding to  
carry out simple one-or two-step instructions" in "standardized situations with  
occasional or no variables." DOT at 1011. In contrast, a job with a reasoning  
level of three would require that the worker "[a]pply commonsense  
understanding to carry out instructions furnished in written, oral, or  
diagrammatic form" and deal "with problems involving several concrete

1 variables ....” DOT at 1011. The middle ground between these two points is  
2 also where the vocational expert identified a job with the lowest reasoning  
development score that Meissl could perform, namely a stuffer.

3 A job with a reasoning level of two requires that the worker “[a]pply  
4 commonsense understanding to carry out detailed but uninvolved written or  
oral instructions” and deal with problems “involving a few concrete variables  
5 ....” DOT at 1011. Thus, such a job would involve more detail, as well as a  
few more variables, than that with a reasoning level of one. The question  
6 becomes whether a person limited to carrying out simple, repetitive  
instructions could still perform a job with such a reasoning score.  
7

8 Meissl focuses on the fact that the DOT description for a reasoning level of 2  
uses the word “detailed.” Essentially, Meissl seeks to equate the DOT’s use of  
9 the word “detailed” with the Social Security regulations’ use of the word  
“detailed instructions” in formulating a claimant’s mental RFC. The Court is  
10 not convinced that such a neat, one-to-one parallel exists between the two.

11 The Social Security regulations separate a claimant’s ability to understand and  
remember things and to concentrate into just two categories: “short and simple  
12 instructions” and “detailed” or “complex” instructions. 20 C.F.R. §  
416.969a(c)(1)(iii); *see also* 20 C.F.R. part 404, subpart P, Appendix 1,  
13 Listing 12.00C(3) (“You may be able to sustain attention and persist at simple  
tasks but may still have difficulty with complicated tasks”). The DOT, on the  
14 other hand, employs a much more graduated, measured and finely tuned scale  
starting from the most mundane (“simple one- or two-step instructions” at  
15 level one), moving up to the most complex (“applying principles of logical or  
scientific thinking ... apprehend the most abstruse classes of concepts” at level  
16 six). DOT at 1010-1011. To equate the Social Security regulations use of the  
term “simple” with its use in the DOT would necessarily mean that all jobs  
17 with a reasoning level of two or higher are encapsulated within the  
regulations’ use of the word “detail.” Such a “blunderbuss” approach is not in  
18 keeping with the finely calibrated nature in which the DOT measures a job’s  
simplicity.  
19  
20

21 Even more problematic for Meissl’s position is that she ignores the qualifier  
the DOT places on the term “detailed” as also being “uninvolved.” This  
22 qualifier certainly calls into question any attempt to equate the Social Security  
regulations’ use of the term “detailed” with the DOT’s use of that term in the  
23 reasoning levels. Instead of simply seeking to equate the two scales based on  
the serendipity that they happen to employ the same word choice, a much  
24 more careful analysis is required in comparing the claimant’s RFC with the  
DOT’s reasoning scale.  
25

26 Here, the ALJ found that Meissl could perform not just simple tasks but also  
ones that had some element of repetitiveness to them. A reasoning level of one

1 on the DOT scale requires slightly less than this level of reasoning. While  
2 reasoning level two notes the worker must be able to follow “detailed”  
3 instructions, it also (as previously noted) downplayed the rigorousness of  
4 those instructions by labeling them as being “uninvolved.”

5 The Court finds that there is much to recommend for believing that Meissl’s  
6 reasoning level is at level two rather than at level one. A reasoning level of  
7 one indicates, both by the fact that it is the lowest rung on the development  
8 scale as well as the fairly limited reasoning required to do the job, as applying  
9 to the most elementary of occupations; only the slightest bit of rote reasoning  
10 being required. For example, the DOT describes the following jobs as  
11 requiring only a reasoning level of one: Counting cows as they come off a  
12 truck (job title Checker (motor trans.)); pasting labels on filled whiskey bottles  
13 (job title Bottling-Line Attendant (beverage)); and tapping the lid of cans with  
14 a stick (job title Vacuum Tester, Cans). *See* DOT at 931, 936, 938. Someone  
15 able to perform simple, repetitive instructions indicates a level of reasoning  
16 sophistication above those listed. Other courts have so held. *See Hackett v.*  
17 *Barnhart*, 395 F.3d 1168, 1176 (10th Cir.2005) (holding that “level-two  
18 reasoning appears more consistent with Plaintiff’s RFC” to “simple and  
19 routine work tasks”); *Money v. Barnhart*, 91 Fed.Appx. 210, 214, 2004 WL  
20 362291, at \*3 (3rd Cir.2004) (“Working at reasoning level 2 would not  
21 contradict the mandate that her work be simple, routine and repetitive”). As  
22 one court explained:

23 The ALJ’s limitation for the Plaintiff, with respect to an appropriate reasoning  
24 level, was that she could perform work which involved simple, routine,  
25 repetitive, concrete, tangible tasks. Therefore, the DOT’s level two reasoning  
26 requirement did not conflict with the ALJ’s prescribed limitation. Although  
the DOT definition does state that the job requires the understanding to carry  
out detailed instructions, it specifically caveats that the instructions would be  
uninvolved-that is, not a high level of reasoning.

*Flaherty v. Halter*, 182 F.Supp.2d 824, 850 (D.Minn.2001).

Meissl v. Barnhart, 403 F.Supp.2d 981, 983-85 (C.D.Cal. 2005).

21 This case is somewhat different than the situation facing the district court in Meissl. As  
22 discussed by the district court above, in Meissl the ALJ limited the claimant to simple and  
23 *repetitive* tasks, whereas the ALJ in this case limited plaintiff to simple *routine* tasks. But the  
24 undersigned finds the fact that in one case the work involves repetitive tasks, whereas in this one  
25 routine ones are involved, to be a distinction without a meaningful difference, nor is there any  
26

evidence to the contrary. Further, as the Meissl court noted, Level 1 reasoning is “the lowest rung on the development scale,” which involves “fairly limited reasoning required to do the job,” and is to be applied to “the most elementary of occupations,” with “only the slightest bit of rote reasoning being required.” Id. at 984.

It is true that in finding the claimant in that case could perform Level 2 reasoning, the district court in Meissl focused on the ALJ’s finding that the claimant could do “not just simple tasks but also ones that had some element of repetitiveness to them.” While it also is true that the ALJ here made no such finding regarding repetitiveness, the ALJ gave no indication she intended to limit plaintiff to those type of jobs requiring “only the slightest bit of rote reasoning.” As such, there is no error here or conflict between the DOT and the testimony of the vocational expert requiring further inquiry by the ALJ.<sup>9</sup> Nor does the record support a finding that plaintiff would have extreme difficulties in being punctual or in maintaining attendance, such that she would miss more than two days of work a month.

#### VIII. This Matter Should Be Remanded for Further Administrative Proceedings

The Court may remand this case “either for additional evidence and findings or to award benefits.” Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record that the claimant is

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<sup>9</sup> The ALJ may rely on vocational expert testimony that “contradicts the DOT, but only insofar as the record contains persuasive evidence to support the deviation.” Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995). The ALJ, furthermore, has the affirmative responsibility to ask the vocational expert about possible conflicts between her testimony and information in the DOT. Haddock v. Apfel, 196 F.3d 1084, 1091 (10th Cir. 1999); SSR 00-4p, 2000 WL 1898704. Before relying on evidence obtained from a vocational expert to support a finding of not disabled, therefore, the ALJ is required to “elicit a reasonable explanation for any discrepancy” with the DOT. Haddock, 196 F.3d at 1087; SSR 00-4p, 2000 WL 189704 \*1. The ALJ also must explain in his or her decision how the discrepancy or conflict was resolved. SSR 00-4p, 2000 WL 189704 \*4. Here, though, as explained above, there is no discrepancy or conflict requiring resolution by the ALJ.

1 unable to perform gainful employment in the national economy,” that “remand for an immediate  
2 award of benefits is appropriate.” Id.

3 Benefits may be awarded where “the record has been fully developed” and “further  
4 administrative proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan  
5 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded  
6 where:

7  
8 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
9 claimant’s] evidence, (2) there are no outstanding issues that must be resolved  
10 before a determination of disability can be made, and (3) it is clear from the  
record that the ALJ would be required to find the claimant disabled were such  
evidence credited.

11 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

12 Because issues still remain with respect to the sit/stand/walk option assessed by Mr. Gehley and  
13 the sit/stand option adopted by the ALJ, and thus also with respect to the ALJ’s assessment of  
14 plaintiff’s residual functional capacity and plaintiff’s ability to perform other jobs existing in  
15 significant numbers in the national economy, remand for further administrative proceedings is  
16 appropriate in this case.


### 17 CONCLUSION

18  
19 Based on the foregoing discussion, the undersigned recommends the Court find the ALJ  
20 improperly concluded plaintiff was not disabled. Accordingly, the undersigned recommends as  
21 well that the Court reverse the ALJ’s decision and remand this matter to defendant for further  
22 administrative proceedings in accordance with the findings contained herein.

23  
24 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure (“Fed. R. Civ. P.”)  
25 72(b), the parties shall have **fourteen (14) days** from service of this Report and  
26 Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file

1 objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn,  
2 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk  
3 is directed set this matter for consideration on **December 7, 2012**, as noted in the caption.

4 DATED this 15th day of November, 2012.

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8 Karen L. Strombom  
9 United States Magistrate Judge  
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